IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2144 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABDUL RAOOF ALIAS RAOOF ABDUL KADER SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MR YU MALIK for Petitioner

Mr. HL Jani, APP for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 26/06/2001

ORAL JUDGEMENT

Rule. Service of rule is waived by Mr. H.L. Jani, learned APP appearing for the State.

Heard learned advocates for the parties.

Present petition has been filed by the petitioner under section 407 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for short) challenging the order passed by the learned Principal Judge, City Sessions Court, Ahmedabad dated 25th January, 2001 in criminal miscellaneous application no. 2453 of 2000 in sessions case no. 240 of 1996. The petitioner, initially, approached the learned Additional City Sessions Judge by filing application to transfer sessions case No. 240 of 1996 to other sessions court in the same sessions division. The concerned sessions court rejected the application filed by the petitioner on 20th October, 2000 and observed while rejecting the said application by observing that the petitioner may prefer transfer application before the forum if he is desired. With such observations, application submitted by the petitioner at Exh. 138 has been rejected by the learned Additional City Sessions Judge. After rejection of the said application, the petitioner preferred application before the Principal Judge, City Sessions Court by filing criminal miscellaneous application no. 2453 of 2000 in sessions court which too came to be rejected by the learned Principal Judge, City Sessions COurt, Ahmedabad by order dated 25.1.2001 and, thereafter, the petitioner has filed the present application before this Court under section 407 of the Code.

Learned advocate Mr. Malik, while challenging the orders in question, has submitted that the learned Additional Sessions Judge Shri A.J. Bhatt who tried sessions case no. 45 of 1998 has convicted the present petitioner and has also simultaneously tried and recorded the evidence in sessions case no. 240 of 1996 wherein the petitioner is an accused. In sessions case no. 240 of 1996, written arguments have been submitted by the parties and the case has been fixed for oral arguments. The case is at the stage of oral arguments to be advanced by the prosecution and the accused side. During the pendency of the arguments and in view of the fact that in previous sessions case no. 95 of 1998, documentary and oral evidence was led by the prosecution in both the sessions cases was common, similar and identical and, therefore, the petitioner, having reasonable apprehension that he will not get fair trial in sessions case no. 240 of 1996 before the learned Additional Sessions Judge Shri A.J. Bhatt, has filed application for transfer of the sessions case no. 240 of 1996 to other sessions court. The application submitted by the petitioner before the learned Additional Sessions Judge and then before the

Principal Judge, City Sessions Court, Ahmedabad has been rejected as aforesaid. While rejecting the application submitted by the petitioner, the learned Principal Judge, City Sessions COurt, Ahmedabad has observed as under:

> "I am conscious that by the transfer of the sessions case no. 240 of 1996, the prosecution will not suffer and the accused will also better confidence in the court of law, however, in the present set of facts, whether it is proper for me to transfer the case is a question of million. "

The learned Principal Judge, City Sessions Court, Ahmedabad then observed as under:

> "In view of the facts stated in the application, I am of the opinion that once judicial order is passed by brother judge Shri A.J. Bhatt by rejecting the application Exh.138 in sessions case no. 240/96, I cannot sit in appeal or review the order passed by Shri A.J. Bhatt. Section 408 of the Cr.P.C. says that whenever it is made to appear to a sessions judge that order under this sub sec. is expedient for the hands (ends) of justice, he may order that particular case be transferred from one criminal court to another court in his sessions division. In my opinion, the order passed by brother judge Shri A.J. Bhatt by rejecting the application Exh.138 was not administrative order but judicial order. On administrative side,if any order is passed by any other additional sessions judge to invoke its own power, however, where the order is passed in judicial proceedings. I am afraid. I cannot interfere in the said order. Under the circumstances, I am of the opinion that now my hands are tight and I cannot review or sit in appeal over the order passed by brother judge Sri AJ Bhatt by rejecting application Exh.138."

Learned advocate Mr. Malek has heavily relied upon the observations as aforesaid made by the learned Principal Judge, City Sessions COurt, Ahmedabad and has pointed out that though the observations are in favour of the petitioner, however, the application has been rejected considering the fact that the learned Additional City Sessions Judge Shri A.J. Bhatt has passed the order on judicial side and considering the limitation in exercising the powers, the learned Principal Judge has not exercised the powers. After making reference of the observations made by the learned Principal Judge in his

order while rejecting the application for transfer of the sessions case in question, learned Advocate Mr. Malek has relied upon some of the decisions of various High COurts as well as of the apex court. Three decisions are relevant which are as under :

1. Ram Ratan and another versus State, Opposite Party, reported in 1996 Cri. L.J. 1799 (Allahabad High COurt).

2. Adam Basha versus The State of Karnataka reported in 1975 Criminal Law Journal 744.

3. Govind Sharan Agarval reported in 1983 (2) SCC 268.

Learned APP Mr. Jani has submitted that both the Courts have considered the application filed by the petitioner and has rightly rejected the application submitted by the petitioner for transfer of sessions case no. 240 of 1996 before some other sessions court on the ground that once the learned Additional sessions Judge has already appreciated the evidence which was recorded and considered to be common evidence, then he can not appreciate the same on the basis of common evidence and the petitioner may pursue by way of oral arguments before the learned Additional Sessions Judge to take different view in the matter. Therefore, according to the submission of learned APP Mr. Jani, the order passed by the Courts below are legal, valid and just and this Court should not interfere with the same.

I have considered the submissions of both the learned advocates and have also considered the relevant provisions of section 407 of the Code. As per section 407 of the Code, whenever it is made to appear to the High Court - (a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto, or (b) that some question of law of unusual difficulty is likely to arise, or (c) that an order under this section is required by provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, then, this court can exercise powers to transfer the pending sessions case to other sessions court. There is also one of the condition that such powers can be exercised only when such an application for such transfer has been made to the sessions court concerned and the sessions court concerned has rejected the same. I have considered the decision of the Karnataka High COurt reported in 1975

Cri. L.J. 744. Relevant observations made by the Karnataka High COurt in the said decision reads as under:

" After the arguments in appeal were heard by the sessions judge and the judgment was reserved, on the day the judgment was to be pronounced the accused filed an application for recording additional evidence. The Public Prosecutor in his objection to the application stated among other things that the accused was a beggar in the eye of law. This was objected to by the Counsel for the accused. During the exchange of words the sessions judge intervened and said that the PP was a man of integrity and in ability second to none. The sessions judge further expressed his opinion that the accused not only should be convicted but also deserved deterrent sentence.

Held that the sessions judge had prejudged the issue and further proceedings could serve no useful purpose. He thus gave an indication of his mind on a vital aspect of the matter and provided a basis for a reasonable apprehension in the mind of the accused.

The observations of the Judge may admit of some explanation But if they tend to create in the mind of the accused an apprehension that he may not have a fair decision, it would be expedient in the interest of justice to order transfer. It is of the utmost importance that litigants should have faith and confidence in the impartiality of the Courts. It is not enough to do justice. It must be seen to be done. "

In case of Govind Sharan Aggarwal versus Pr. Hardeo Sharma Trivedi reported in (1983) 2 SCC 268, this Court has held as under:

"2. Having regard to the very peculiar and special circumstances of this case, without casting any reflection on the District Judge, we think that the apprehension of the appellant that he will not get fair trial at the hands of Mr. Kainthla cannot be said to be reasonable. One of the factors that has weighed with us was that in a civil suit this very Judge had granted a huge cost of Rs.5000.00 as lawyer's fee and a sum of Rs.1500.00 as lawyer's fee in an interlocutory

matter. This is a rather very extraordinary course that seems to have been adopted by the learned Judge. He may or may not be justified in this, but if the appellant has an apprehension on this score, it cannot be said that his apprehension is not well founded. "

According to my opinion, the observations made by the High Court of Allahabad are required to be considered. In almost identical case and situation, the Allahabad High COurt has held as under in the decision reported in 1976 Cri.LJ 1799.In para 2 of the report, it has been held as under:

"2. One ground, however, is that the present accused had been tried in the same court and had been convicted by the learned judge on the basis of the evidence of certain persons who are also witnesses in the present trial. It is urged that as the learned Judge had believed these witnesses in the earlier case, there is possibility that the learned Judge may believe them again. A witness is believed on the basis of many factors. One of the factors is the demeanor of the witness. In the earlier case, the court had believed these witnesses from which it could be inferred that the demeanor of the witnesses had been accepted as indicating the demeanor of a truthful witness. The same witnesses will be coming again. There is no doubt that the learned judge's mind will not be influenced by the fact that he had believed their testimony in the earlier case. But this may be a factor which ay remain lurking in the mind of the accused throughout the trial and if these witnesses are believed again they may have a feeling that the judgment of the learned Judge was influenced by the opinion he had made about these witnesses in the earlier case. In a criminal prosecution a court is always to give an accused a trial in which he may not have even the remotest cause to think or feel that he did not get a fair trial."

Looking to the peculiar facts of the present case, according to my opinion, there are some observations made by the apex court in other cases which are very relevant and material in the facts and circumstances of the case. They are, therefore, referred to as under:

In case of B.K. Narayanpillai versus Parameswaran Pillai (2000) 1 SCC 711, it has been observed by the apex court as under:

> "Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties."

In case of Gaya Prasad versus Pradeep Srivastava reported in (2001) 2 SCC 604, the apex court has observed as under:

> "The time is running out for doing something to solve the problem which has already grown into monstrous form. If a citizen is told that once you resort to legal procoedure for realisation of your urgent need, you have to wait and wait for 23 to 30 years, what else is it if not to inevitably encourage and force him to resort to extra legal measures for realising the required reliefs. A Republic, governed by rule of law, cannot afford to compel its citizens to resort to such extra legal means which are very often contra legal means with counterproductive results on the maintenance of law and order in the country."

In case of Kulwant Kaur v. Gurdial SIngh Mann reported in (2000) 4 SCC 262, the apex court has observed as under:

> "Technicality alone by itself ought not to permit the High COurts to decide the issue since justice oriented approach is the call of the day presently."

In case of Government of A.P. versus A.P. Jaiswal reported in (2001) 1 SCC 748, the apex court has observed as under:

> "Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect for the rule of finality. It is with a view to achieve consistency in judicial pronouuncements, the courts have evolvled the rule of precedents principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice."

In case of Abdul Rehman Antulay v. R.S. Nayak reported in (1992) 1 SCC 225 : 1992 SCC (Cri) 93, the apex court has observed as under:

"Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of criminal case is fair, just and reasonable ? It is both in the interest of the accused as well as the society that a criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable despatch - reasonable in all the circumstances of the case. Since it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right. It needs no emphasis to say, the very fact of being accused of a crime is cause for concern. It affects the reputation and the standing of the person amongst his colleagues and in the society. It is a cause for worry and expense. It is more so, if he is arrested. If it is a serious offence, the man may stand to lose his life, liberty, career and all that he cherishes."

In case of R. Balakrishnan Pillai versus State of Kerala reported in 2000 AIR SCW 3071, the apex court has observed as under in para 10 of the reports as under:

"10. Further, the contention raised by the learned Counsel for the petitioner that one of the Judges of the Bench was appointed and has worked as an Advocates to assist Justice K. Sukumaran Commission to inquire into malpractices in the execution of the rectification work in Hydro Electric Project called Edamalayar Project and, therefore, the petitioner is not likely to get justice if the appeal is decided by the said Bench,deserves to be rejected. It is true that one of the principles of the administration of justice is that justice should not be done but it should be seen to have been done. However, a mere allegation that there is apprehension that justice will not be done in a given case is not

sufficient. Before transferring the case, the Court has to find out whether the apprehension appears to be reasonable. To judge the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all.The apprehension must appear to the Court to be a reasonable, genuine and justifiable. In the present day scenario, if these types of applications are entertained, the entire judicial atmosphere would be polluted with such frivolous petitions for various reasons.Dealing with the transfer petition, this court in Maneka Sanjay Gandhi v. Rani Jethmalaani (1979) 2 SCR 378 : AIR 1979 SC 468 : (1979 Cri LJ 458), observed (Para-2) :-

"Assurance of a fair trial is the first imperative of the dispension of justice and the central criterion for the Court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. SOmething more substantial, more compelling, more imperilling, from the point of view of justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any Court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harrass the parties and from the angle the Court may weigh the circumstances. "

In case of Abdul Nazar Madani versus State of Tamil Nadu and another reported in 2000 AIR SCW 2425, the apex court has observed as under in para 7 of the report:

"7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced

by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer and anywhere in the country under section 406 of the Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispension of criminal justice is not possible impartially and objectively and without any basis, before any Court or even at any place, the appropriate court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, witnesses and the larger interest of the society."

I have considered the principles laid down by the High Court of Karnataka as well as the apex court in the aforesaid decisions. I have considered the facts of the present case and also considered the observations made by the learned Principal Judge, City Sessions Court, Ahmedabad that in case if the present sessions case no. 240 of 1996 is transferred to some other sessions court, it will not cause any prejudice or will also not cause any adverse effect on the prosecution but on the contrary if it is not transferred, then, the confidence of the petitioner in the judiciary will be affected adversely. One fact is very much clear that on the basis of the common evidence and similar and identical facts, on the basis of the documentary evidence as well as the oral evidence which was led in other sessions case namely sessions case No. 45 of 1998, the concerned petitioner has been convicted by the learned Additional City Sessions Judge and again the very same Judge is required to reappreciate the same evidence against the petitioner. In view of these facts, the petitioner is apprehending that in view of the common evidence and identical facts,

he may again be convicted by the same Judge and therefore, he wants that this matter may be transferred to some other sessions court so as to enable him to convince the court to reappreciate the same evidence led in the matter. If he is the same Judge who will try the sessions case no. 240 of 1996, then, possibility of convincing the Judge in view of the earlier conviction recorded by the said Judge will be very much less and he may not get fair and impartial opportunity. Therefore, considering all these aspects of the matter and also looking to the peculiar facts of the present case as stated hereinabove, present petition is required to be allowed and the order passed by the Additional Sessions Judge, City Sessions Court No.3, Ahmedabad dated 20th October, as well as the order passed by the Principal Judge, City Sessions Court, Ahmedabad in criminal misc. application no. 2453 of 2000 in sessions case no. 240 of 1996 are required to be quashed and set aside and the Principal Judge, City Sessions Court, Ahmedabad is required to be directed to transfer the said sessions case before some other sessions court in the same division.

For the reasons recorded hereinabove, this petition is allowed. The order dated 20th October, 2000 passed by the learned Additional Sessions Judge, Court No. 3, City Sessions Court, Ahmedabad as well as the order dated 25th January, 2001 passed by the learned Principal Judge, City Sessions Court, Ahmedabad in Criminal Misc. Application No. 2453 of 2000 in sessions case no. 240 of 1996 are hereby quashed and set aside. Learned Principal Judge, City Sessions Court, Ahmedabad is hereby directed to transfer sessions case no. 240 of 1996 to some other sessions court in the same sessions division from the Court of learned Additional Sessions Judge, Court No. 3, City Sessions Court Ahmedabad. It is further directed that the sessions case no. 240 of 1996 is pending at the stage of oral arguments and the case is required to proceed further from the said stage of oral arguments and the stage of oral evidence has already been over. Rule is made absolute in terms indicated hereinabove.

26.6.2001. (H.K. Rathod,J.)

Vyas